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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77- 1328

RUVEN ST. PIERRE,
v.

Petitioner,

EXXON CORPORATION, BOOKER DRILLING CO., INC.,
and LIBERTY MUTUAL INSURANCE CO.,

Respondents,

RUVEN J. ST. PIERRE,
v.
Petitioner,

EXXON CORPORATION, BENNIE P. TOUPS,
RICHARD N. BOSS and JOE W. MOORE,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING CERTIORARI	9
1. The Fifth Circuit Violated this Court's Rulings by Determining Petitioner's Rights and Status under LHWCA and Applied Federal Law, Rather Than Under the Lands Act, Which Would Have Made State Law Applicable	9
2. There is a Conflict Among the Circuits, and This Court Should Decide, As to Whether the Status of Borrowed Servant Under the Lands Act Is a Question of Law or Fact, and Which Criteria Should Be Applied to Determine That Status	9
3. The Granting of Summary Judgment Under the Lands Act on a Disputed Record Such as This One Is Both Erroneous and Precedentially Dangerous	9
CONCLUSION	13
APPENDIX A ¹ —Opinion and Order of the United States District Court for the Western District of Louisiana/Gaudet	1a
APPENDIX B —Minute Entries/St. Pierre	4a
APPENDIX C —Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit	9a

¹ In each instance the APPENDIX notation refers to the APPENDIX contained in a companion petition, *Gaudet v. Exxon Corporation*, No. 77-1284, filed with this Court March 14, 1978.

II

INDEX—Continued

	Page
APPENDIX D—Petition for Rehearing/Gaudet	24a
APPENDIX E—Petition for Rehearing En Banc/St. Pierre	25a
APPENDIX F—Statutory Provisions Involved	27a
CASES CITED	
<i>Adickes v. S. H. Kress & Co.</i> , 398 U.S. 144 (1970)	10
<i>American Mfrs. Mut. Ins. Co. v. American Broad- casting—Paramount Theatres, Inc.</i> , 388 F.2d 272 (2d Cir. 1967)	10
<i>Fortner Enterprises, Inc. v. United States Steel Corp.</i> , 394 U.S. 495 (1969)	10
<i>Kennedy v. Silas Mason Co.</i> , 334 U.S. 249 (1948)	10
<i>Poller v. Columbia Broadcasting System, Inc.</i> , 368 U.S. 464 (1962)	10
<i>United States v. Diebold, Inc.</i> , 369 U.S. 654 (1962)	10
Statutes:	
28 U.S.C. § 1254(1)	2
33 U.S.C. § 904	6
33 U.S.C. § 930	7
43 U.S.C. § 1333(b)	7

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**PETITION FOR A WRIT OF CERTIORARI TO
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Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in these

cases on November 4, 1977, rehearing *en banc* denied December 19, 1977.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana in the cases of Ruven J. St. Pierre, petitioner herein, were not printed but appear at page 4a of Appendix A to a companion *Gaudet v. Exxon Corporation* petition No. 77-1284.² The opinion in the related *Gaudet* case was also not printed but appears as Appendix A to the *Gaudet v. Exxon Corporation* petition (A 1a).

The opinion and judgment of the Fifth Circuit Court of Appeals combining the St. Pierre and Gaudet cases and affirming the decisions of the District Courts was rendered on November 4, 1977, is printed at 562 F.2d 351 (5th Cir. 1977), and is reprinted as Appendix C (A 9a). A petition for rehearing was denied by the Fifth Circuit in the Gaudet case on December 14, 1977, and is printed as Appendix D (A 24a). A petition for rehearing *en banc* in both of the St. Pierre cases was denied on December 19, 1977, and is printed as Appendix E (A 25a).

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered November 4, 1977. A timely petition for rehearing *en banc* in both the St. Pierre cases was denied December 19, 1977. This petition for a writ of certiorari is being filed within 90 days of December 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

² All page citations to the Appendices refer to the Appendix contained in the companion *Gaudet v. Exxon Corp.* petition, No. 77-1284, filed with this Court March 14, 1978 and are hereinafter preceded by the designation "A".

STATUTORY PROVISIONS INVOLVED

The relevant portions of the statutory provisions involved appears as Appendix F (A 27a).

QUESTIONS PRESENTED

The Outer Continental Shelf Lands Act (Lands Act), under which this suit was brought, provides that adjacent state law shall control in suits under the Act except to the extent that such state law directly conflicts with applicable federal law. The Lands Act makes applicable the compensation provisions of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) in certain circumstances. Here, LHWCA was asserted by respondent (Exxon) to defeat a suit for negligence brought by an employee (petitioner) of another company (Bourne's Welding) on the theory that petitioner was a "borrowed servant" and thus an employee of Exxon. Summary judgment was granted in favor of Exxon and against petitioner. The questions presented are:

1. When a suit is brought for negligence under the federal Lands Act, and LHWCA is asserted as a defense, is the issue as to whether the suing employee is a "borrowed servant" and thus entitled only to LHWCA compensation an issue to be determined by interpretation of the Lands Act (with state law thus made applicable) or by interpretation of LHWCA?
2. Whether or not federal law applies in a suit under the Lands Act, is the status of "borrowed servant" one to be determined as a matter of law, and thus taken from the jury, or is it a question of fact to be submitted, where there is a disputed pre-trial record, to a jury at trial?
3. What factors determine whether an employee is a borrowed servant under the Lands Act so as to defeat a

suit for common law negligence, and is the weight and inferences to be accorded each of such factors a matter for jury consideration or a matter for judicial determination by way of summary judgment?

4. Is it proper for a federal court to grant summary judgment in favor of a party (Exxon) claiming the existence of a borrowed servant relationship under the Lands Act to defeat a suit for common law negligence where such facts as the following are present:

(a) A contract between Exxon and Welding, petitioner's regular employer, provided that petitioner's work was to be under the control of Welding, that Welding was to be an independent contractor as to all such work performed, and that the Exxon was interested only in the result obtained;

(b) Exxon admitted that St. Pierre was in fact a Welding employee, and St. Pierre swore that only Welding paid his wages, that only Welding could terminate his employment, and that he had been employed by Welding continuously for seventeen years;

(c) Welding's insurer paid LHWCA compensation benefits to petitioner as an employee of Welding;

(d) The nature of the transactions between Exxon, Welding and St. Pierre establishes that St. Pierre functioned as a Welding representative and that as a representative of Welding, Exxon exercised only limited control over St. Pierre as set forth in the following facts contained in the record:

(i) The usual business relationship between Exxon and Welding was a customer-independent contractor relationship whereby Exxon identified projects, Welding personnel performed the obligations of Welding as speci-

fied in the contract, Welding's employees completed the projects in their own way without direct technical direction from Exxon, and Welding billed Exxon for each project so identified and executed;

(ii) Consistent with the characterization above, Exxon's directions to St. Pierre were only for the purpose of indicating the work to be done and co-ordinating activities at the site, and in that sense Exxon's control over St. Pierre was of the same nature as its control over Welding: a customer-independent contractor relationship;

(iii) St. Pierre swore that he was working on a project at the time of the accident as a result of the Exxon/Welding contract, that since Exxon had no welders at the site his services were requested to assist a roustabout crew of general laborers and a supervisor unskilled in the art of specialized welding, that he was usually told what welding work needed to be done, and that he supervised and controlled his own performance without direct project supervision by Exxon.

STATEMENT OF THE CASE

This case arises out of personal injuries sustained by petitioner St. Pierre while providing specialized welding services on a production platform owned by respondent Exxon Corporation. Exxon's platform rests upon the Outer Continental Shelf off the coast of Louisiana near Grand Isle. The accident occurred when a barrel upon which petitioner was standing exploded, injuring St. Pierre.

At the time of the accident, St. Pierre was working on the Exxon platform pursuant to a contract between Bourne's Welding Service, Inc. (Welding) and Exxon. St.

Pierre was an employee ("welder") of Welding (CA 51, 72)² and for many years had regularly been assigned stints of duty on various Exxon platforms. On the day of the accident, St. Pierre was installing a platform generator—a project for which Welding specifically billed Exxon (CA 72).

The Exxon/Welding contract (CA 86, 87, 88) specifically established that workers assigned by Welding for work on Exxon's platforms were to be considered independent contractors:

III. It is understood and agreed that all work so done by Contractor [Welding] shall meet with the approval of Humble's [Exxon's] representatives, but that *the detailed manner and method of doing the work shall be under the control of Contractor*, Humble being interested only in the result obtained and that *Contractor is an independent Contractor as to all work performed hereunder*: [Emphasis added.⁴]

Following his injury, St. Pierre filed a claim against his employer, Welding, under LHWCA, 33 U.S.C. § 904,

² "CA" refers to the Appendix filed with the Fifth Circuit Court of Appeals in the St. Pierre v. Exxon Corporation et al. case No. 76-1196.

⁴ The contract also provided Exxon with the benefit of Welding's insurance coverage in the event that one of Welding's employees filed a claim against Exxon on the theory of being Exxon's employee through application of the borrowed servant doctrine. This subsection reads:

10. Endorsement that a claim made against Humble [Exxon] and/or its underwriters by an employee of assured-Employer [Welding] hereunder based on the "doctrine of borrowed servant" shall, for purposes of this insurance, be treated as a claim arising under this policy against the assured-Employer and Humble shall receive the benefit of this insurance.

and he is currently receiving benefits under this Act (CA 39, 65). St. Pierre also filed two suits in the United States District Court for the Eastern District of Louisiana under the Lands Act, 43 U.S.C. § 1333(b), one against Exxon (No. 76-1196) and another against Exxon and Exxon employees Toups, Boss, and Moore (No. 76-2668) for negligence proscribed by the common law of the State of Louisiana. The reason for bringing this action was to obtain full recompense for all of the damages suffered because of St. Pierre's injury negligently caused by Exxon.

Exxon in its response to interrogatories failed to establish that St. Pierre was actually an employee of Exxon (CA 26, 27, 42, 43) and Exxon conceded that it did not file an accident report as required of employers under the LHWCA, 33 U.S.C. § 930 (CA 33, 47). Nevertheless, Exxon filed a motion for summary judgment, claiming that St. Pierre was its "borrowed servant", or employee, and thus that St. Pierre's exclusive claim was for compensation in accordance with LHWCA.

In a sworn statement and other materials filed in opposition to Exxon's motion, the following facts, among others, appeared: St. Pierre swore that he was an employee of Welding, that he had been employed as a welder by Welding for seventeen years (CA 51, 127), that Exxon contracted Welding to carry out a specific project (hooking up a generator), and that Exxon requested the service since it did not have a welder of its own at the site (CA 51). In addition, it was stipulated in the contract that Welding would furnish the tools for all of St. Pierre's work (CA 86).

A statement filed by the attorney for St. Pierre pursuant to the rules of the District Court below, a signed statement of St. Pierre and other elements of the record set forth facts which support the argument that

St. Pierre was acting in the capacity of an independent contractor, not as an employee of Exxon, at the time of the accident. The relationship between Exxon and Welding was that of customer and independent contractor (CA 86, 74) whereby Exxon identified projects (CA 51, 73), Welding employees carried out the projects using their own discretion and judgment without direct technical direction from Exxon (CA 111, 112), and Welding billed Exxon for each project so identified and executed (CA 72).

At the time of the accident St. Pierre had been on a project to hook up a generator for three days (CA 51).

The work being performed by St. Pierre was of a specialized nature, i.e., welding, fitting and steel construction (CA 111). As an expert welder, the only welder on the platform at the time of the injury (CA 51), St. Pierre supervised and controlled his own method of performing his specialized tasks without direct supervision by Exxon. Accordingly, Exxon's directions to St. Pierre were only for the purpose of indicating the work to be done and its control over St. Pierre was of the same nature as its control over Welding: a customer-independent contractor relationship. Thus St. Pierre through his attorney has denied that Exxon exercised complete and absolute control over St. Pierre's work since he was only told what projects to work on and he pursued Welding's obligations in his own specialized and expert manner (CA 112).

Despite these facts, the District Court found on the basis of other affidavits and depositions that St. Pierre "for all practical purposes has been the employee of Exxon", that the basic "facts are not in dispute," that St. Pierre was Exxon's "borrowed servant," and that therefore St. Pierre's exclusive remedy was under LHWCA (A 4a). The District Court granted summary judgment to Exxon (A 6a).

The Fifth Circuit Court of Appeals combined the St. Pierre cases with a similar case involving one Gaudet, who had also performed work for Exxon but who had been regularly employed by Tidelands Marine Service, Inc. The court affirmed the granting of summary judgment in all three cases. In doing so, it held, *inter alia*, that “[c]onsidering this as best viewed as a question of the extent of coverage under the LHWCA, federal law applies” (A 17a), and “the issue of whether a relationship of borrowed servant existed is a matter of law” (A 18a).

REASONS FOR GRANTING CERTIORARI

The initial two reasons for granting certiorari are the same as set forth in the companion *Gaudet v. Exxon Corp.* petition No. 77-1284. Out of deference to judicial economy these reasons are not reprinted herein but rather are restated by reference *in haec verba*.⁵ In brief sum, however, these reasons are that:

- (1) The Fifth Circuit violated this Court's rulings by determining petitioner's rights and status under LHWCA, and applied federal law, rather than under the Lands Act, which would have made state law applicable, and
- (2) There is a conflict among the Circuits, and this Court should decide, as to whether the status of borrowed servant under the Lands Act is a question of law or fact, and which criteria should be applied to determine that status.

3. The Granting of Summary Judgment Under the Lands Act on a Disputed Record Such as This One Is Both Erroneous and Precedentially Dangerous.

Whether the issue of borrowed servant status be termed one of law or fact, it necessarily rests on underlying

⁵ See pages 7-15 of the Gaudet petition No. 77-1284 filed with this Court on March 14, 1978.

facts. Put another way, no matter which criteria or factors are adopted, they must be related to a particular factual context; they cannot be blindly applied without regard to the situation that actually existed between the regular employer, the employee, and the alleged borrowing company.

With that in mind, we respectfully submit that it should be a matter of grave concern when federal courts begin taking cases from juries under circumstances such as existed here. It is axiomatic, of course, that summary judgment is warranted only when no genuine issue as to any material fact exists.⁶ Yet in this case, the record before the trial court contained the following facts, among others:

(a) A contract between Exxon and Welding, St. Pierre's regular employer, provided that St. Pierre's work was to be under the control of Welding and that Welding was to be an independent contractor as to all such work performed (CA 86, 87);⁷

⁶ Fed. R. Civ. P. 56. This Court has pointed out that Rule 56 should not be allowed to permit "[t]rial by affidavit" as a substitute for trial by jury which so long has been the hallmark of 'even handed justice.' *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Moreover, the burden is on the party seeking summary judgment to establish that no material issue of fact is in dispute, and all matters must be construed most favorably to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The danger of too-liberal use of summary judgment has often been pointed out by this and other courts. E.g., *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500 (1969); *Kennedy v. Silas Mason Co.*, 384 U.S. 249, 256-257 (1948); *American Mfrs. Mut. Ins. Co. v. American Broadcasting—Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967).

⁷ The Fifth Circuit suggests that the unequivocal language of the Exxon-Welding contract is somehow compromised by a later provision under Welding's insurance coverage. But that provision related only to possible instances where an employee might attempt to make a claim against some one as a borrowed servant.

(b) Exxon admitted that St. Pierre was actually a Welding employee (CA 57, 58), and St. Pierre swore that he had been an employee of Welding for seventeen years (CA 51, 41) and that he had been interviewed, hired, and paid by Welding (CA 112);

(c) Welding's insurer paid LHWCA compensation benefits to St. Pierre as an employee of Welding (CA 39, 65);

(d) St. Pierre swore, or other evidence established that the usual business relationship between Exxon and Welding was a customer-independent contractor relationship whereby Exxon identified projects, Welding personnel performed the obligations of Welding as specified in the contract, Welding's employees completed the projects in their own way without direct technical direction from Exxon, and Welding billed Exxon for each project so identified and executed (CA 51, 111-113, 72).

(e) Consistent with the characterization above, Exxon's directions to St. Pierre were only for the purpose of indicating the work to be done and coordinating activities at the site, and in that sense Exxon's control over St. Pierre was of the same nature as its control over Welding: a customer-independent contractor relationship (*id.*);

(f) St. Pierre swore that he was working on a project at the time of the accident as a result of Exxon's con-

It did not concede that a borrowed servant relationship could in fact exist, and it certainly had no relevance to the situation here, where Exxon is asserting borrowed servant status as a defense (see n. 4, *supra*).

The Circuit Court also presumed that St. Pierre was a borrowed servant because of the long period during which he worked on Exxon's platforms. It failed to realize that he undoubtedly was aware of the Exxon/Welding contract and therefore assumed during this entire period that he was *not* a borrowed servant but rather an independent contractor, as the contract specifically provided.

tract with Welding, that since Exxon had no welders at the site his services were requested to assist a roustabout crew of general laborers and a supervisor unskilled in the art of specialized welding (*id.*). Moreover St. Pierre swore through counsel that he was usually told what welding work needed to be done (CA 112), and that he supervised and controlled his own method of performing his specialized tasks without direct project supervision by Exxon (CA 111, 112).

As in *Gaudet*, we cite these facts not to demonstrate that the ruling below was in error, which was clearly the case since there were genuine issues of fact in dispute that were relevant even as to the "principal" criteria cited by the Fifth Circuit. We recognize that this Court does not sit simply to correct error. Our point is that if, in an effort to handle burgeoning dockets, federal courts are allowed to take cases from juries where facts are as completely in dispute as they were in this case, then problems of constitutional dimension arise and should warrant summary reversal by this Court.

CONCLUSION

We respectfully urge that for each of the above reasons, the Court should grant certiorari and either reverse summarily the judgment below, or reverse said judgment after argument and remand the case for a trial by jury.

Respectfully submitted,

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